BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEDRO L. VERGARA	)	
Claimant	)	
	)	
VS.	)	
	)	
PERFEKTA, INC.	)	
Respondent	)	Docket No. 1,059,159
	)	
AND	)	
	)	
ACCIDENT FUND NATIONAL INSURANCE	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 27, 2012, preliminary hearing Order entered by Administrative Law Judge John D. Clark. R. Todd King, of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered injury at work each and every working day through December 22, 2011, that arose out of and in the course of his employment by a series of repetitive traumas. The ALJ did not specifically rule that notice was timely, but it is implied because he ordered respondent to pay all authorized medical and to furnish the names of two physicians for the selection of one by the claimant for treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 27, 2012, Preliminary Hearing and the exhibits, and the deposition of Pedro L. Vergara taken February 20, 2012, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant did not give it timely notice of his accident or series of repetitive traumas.

Claimant argues the ALJ correctly found that he suffered an injury by a series of repetitive traumas occurring each working day and the preliminary hearing Order, therefore, should be affirmed.

The issue for the Board's review are:

(1) Did claimant sustain injury by accident and/or by a series of repetitive traumas?

(2) If so, on what date or dates?

(3) Did claimant give respondent timely notice of his accident or series of repetitive traumas?

FINDINGS OF FACT

Claimant began working for respondent as a machinist in 2000. Sometime in late September 2011, claimant had to pick up a vice that was underneath a table. When he picked up the vice, he immediately felt pain in his low back. Later that day or perhaps the next day, claimant started to feel pain in his left leg. Claimant said he was able to finish his shift on the date of the lifting incident, and he did not say anything to anyone at work about hurting his back by picking up the vice. The first time he told anyone at respondent about his injury was on December 22, 2011, when he told someone named Paulino.[1] Claimant said he did not report his injury to respondent earlier because he did not know he could and because he was being treated by his own doctor. Claimant acknowledged that he knew if he was wounded at work, he needed to report the injury to respondent in order to be sent to a doctor. But more than that, he said, "things related to workers compensation, I knew absolutely nothing."[2] He said someone at respondent could have said something about workers compensation during a meeting, but he did not understand English. Finally, claimant was told by a family member that he should tell respondent, and that is when he reported the injury to respondent.

On August 30, 2011, about a month before his alleged accident, claimant was given a Kansas Workers Compensation Compliance Form by respondent. A copy of the form, signed by claimant, was made an exhibit to the preliminary hearing. This form is in English

[1] Respondent does not dispute that claimant gave notice on December 22, 2011.

[2] P.H. Trans. at 25.

only. It sets out that under the revisions of the Kansas Workers Compensation Act, a claim could be denied if an employee failed to provide notice by the earliest of:

> A) 30 calendar days from the date of the accident or the date of injury by repetitive trauma
> B) 20 calendar days from the date medical treatments [*sic*] is sought for the injury
> C) 20 calendar days from my last day of work if I no longer work for the company[3]

The form indicates that if the notice is given in writing, it should be sent to a supervisor or manager. Oral notice was to be provided to Cheryl Weitzel. According to the form, by signing it, the employee acknowledged that he understood the information provided on the form.

Prior to reporting his injury to respondent, claimant was seen by his personal physician, Dr. Antonio Osio on September 30, 2011. Claimant testified he told Dr. Osio that he had been having back pain for a few days, that it was bothering him a lot, and that he had "forced myself at work."[4] But he did not give him an explanation of how he was injured.

Dr. Osio referred claimant to Dr. Robert Eyster. Claimant first saw Dr. Eyster on October 18, 2011. He still had not reported his injury to respondent, and he did not tell Dr. Eyster he had been injured at work. Dr. Eyster's report of October 18 indicates that claimant had a long history of back pain and a week earlier he started having back pain and referred pain into his left leg. Dr. Eyster believed claimant had impingement of the nerve on the left side that was intermittent and was probably from a bulging disc that comes and goes depending on activity. Dr. Eyster treated him with injections and physical therapy, but neither helped. Although Dr. Eyster gave claimant some tips about how to protect his back, he did not place any restrictions on claimant.

In Dr. Eyster's medical note of December 8, 2011, he states: "The patient is very frustrated because he does well on weekends when he is not at work but he has to do enough bending at work that it keeps the disc degenerative changes stirred up with some radiculopathy coming at the L5-S1 area."[5]

Claimant continued to work at respondent after his injury in September 2011. Claimant testified he continued to hurt and get worse between September and December 2011. He acknowledged that from the moment he lifted the vice, he felt pain.

---

[3] PH Trans., Resp. Ex. 1

[4] Vergara Depo. at 15.

[5] PH Trans., Resp. Ex. 2 at 2.

Claimant was examined by Dr. Pedro Murati on February 27, 2012, at the request of claimant's attorney. Dr. Murati diagnosed claimant with low back pain with signs and symptoms of radiculopathy, which Dr. Murati stated was a direct result of the work-related injury that occurred on every working day to December 22, 2011. Dr. Murati gave claimant temporary lifting restrictions and restrictions against bending, crouching, stooping and crawling. He recommended claimant only rarely squat or climb ladders or stairs. Claimant was further restricted to only occasionally sit, stand, walk or drive. Claimant was to alternate sitting, standing and walking and should be allowed to rest. February 27, 2012, was the first time claimant had restrictions.

Claimant has not worked since he reported his injury on December 22, 2011. The record is not clear as to why he was taken off work at that time.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-520 states in part:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> . . . .
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from

the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

K.S.A. 2011 Supp. 44-508 states in part:

(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

(e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

Initially, it must be determined whether claimant sustained injury by a single accident or by repetitive traumas. Respondent contends claimant sustained injury for a single accident at work on September 21 or 22, 2011, from lifting the vice. Claimant's Application for Hearing alleged the "Date of accident" as a series "each working day to December 22, 2011."[8] The cause of his back injury was described as "repetitive lift, carry and operate machinery."[9] Claimant testified that his symptoms started in late September 2011 when lifting the vice but that his subsequent work duties made his condition worse. Dr. Eyster noted that the bending at work kept the degenerative changes "stirred up."[10] Dr. Murati likewise related claimant's low back pain and radiculopathy to claimant's work activities on each and every working day. The ALJ found claimant's injury to have resulted from repetitive traumas at work "each and every day."[11] This Board Member agrees and affirms the ALJ's conclusion that claimant suffered repetitive traumas that arose out of the employment.

Before it can be determined if notice was timely for the repetitive trauma injury, the date of injury must first be decided. K.S.A. 2011 Supp. 44-508(e) provides that the date of injury is the earliest of four dates. Claimant was not taken off work by a physician due to the diagnosed repetitive trauma. Claimant was not placed on modified or restricted duty by a physician due to the diagnosed repetitive traumas. Claimant was not advised by a physician that the back condition was work-related until after his last day worked.

---

[6] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2011 Supp. 44-555c(k).

[8] Form K-WC E-1, Application for Hearing filed January 11, 2012.

[9] *Id.*

[10] P.H. Trans., Resp. Ex. 2 at 2.

[11] ALJ Order (Mar. 27, 2012) at 1.

Therefore, claimant's date of injury is December 22, 2011, the last day he worked for respondent.

Turning now to whether notice was timely given, K.S.A. 2011 Supp. 44-520 provides that notice must be given within 30 days of the repetitive trauma or 20 days from the date the claimant first sought medical treatment or 20 days from the last day worked, whichever is earliest. Claimant's repetitive traumas began in late September and continued until his last day worked of December 22, 2011. He first sought medical treatment on September 30, 2011. Respondent argues that, as such, notice should have been given on or before October 20, 2011. Claimant first gave notice to his employer on December 22, 2011. As this was more than 20 days after medical treatment was sought, notice was untimely. But K.S.A. 2011 Supp. 44-520(a)(1)(B) must be read together with K.S.A. 2011 Supp. 44-508(e). If the date of injury is December 22, 2011, then it is unrealistic and illogical to require notice of injury to be given on an earlier date. Moreover, such a result would render meaningless the date of injury provisions in K.S.A. 2011 Supp. 44-508(e). The 20-day notice requirement in K.S.A. 2011 Supp. 44-520 should be read to mean 20 days from the date claimant first sought medical treatment for the repetitive trauma injury after the date the injury becomes a repetitive trauma injury by the definition in K.S.A. 2011 Supp. 44-508(e). Claimant's date of injury by definition is December 22, 2011. Claimant gave notice to respondent on December 22, 2011. Therefore, notice was timely given.

CONCLUSION

(1) Claimant sustained injury by repetitive traumas.

(2) The date of injury is December 22, 2011, the last day he worked for respondent.

(3) The notice of injury, given by claimant on December 22, 2011, was timely.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated March 27, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: R. Todd King, Attorney for Claimant
trod@kbafirm.com
tking@kbafirm.com

Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
mschaefer@mtsqh.com

John D. Clark, Administrative Law Judge